and he claimed from the third party this sum plus $3,000 general damages for breach of contract.

By his reply the defendant took the extraordinary course of adding thereto a counterclaim which is entirely outside the scope of Order 16A of the Rules of the Supreme Court. It was in effect a claim against the third party for damages for alleged breach of contract, of which there was no mention in his application for leave to issue the third party notice, and for which consequently no leave had been given. I ruled that the action should proceed in so far as any matters raised are relevant to the claim of the plaintiff and to the defendant's claim to be indemnified by the third party, leaving it to be decided, at a subsequent stage of the proceedings, whether I should consider it expedient, on the evidence before the Court, that the defendant and the third party should be permitted, by agreement, to pursue their cross-claims *inter se*. In the event, I have decided that they should not be disposed of in this same action.

As to the plaintiff's claim, I am clearly of opinion that the facts admit of little controversy. The job was done at an agreed price to the defendant's house for which the plaintiff is entitled to payment of the sum claimed. On the evidence it is clear, and I find as a fact, that, notwithstanding that the third party was an independent contractor in respect of the contract for the whole building, in so far as the tiling job was concerned, he was acting as the defendant's agent.

I accept as a true account of what took place, the evidence of Wong Shui Chong (P.W. 2), the plaintiff's salesman, that the defendant said that he was building a house and he wanted to give the plaintiff the tiling job contract; that defendant himself selected the tiles and agreed to the rates quoted. These statements were not challenged in cross-examination. I would add that as between the defendant and the third party, I have no hesitation in preferring the latter as the more truthful and credible witness. The plain fact which stands out above all others in this case is that the cost of tiling had been deducted from the contract price and it fell to the defendant to pay it. The deduction having been agreed upon, it must stand to reason that, in dealing with the plaintiff, the third party could not have been contracting as a principal. The third paragraph of the letter of guarantee was in my view, a direct order by the defendant to the plaintiff to proceed with the tiling job for the payment of which the defendant in the preceding paragraphs made himself responsible. Even if the third party admitted to being personally liable my view is that once the fact of an agency had been established the plaintiff is at liberty to elect whom he would sue. The law on this point is set out in section 186 of the Contracts (Malay States) Ordinance, as follows:

> "In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable."

In this connection I think that article 90 of *Bowstead* on Agency (12th Ed.) at p. 199 is also relevant:

> "Where an agent enters into a contract, oral or written, in his own name, parol evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract, provided that such evidence is not inconsistent with the terms of a written contract."

Apart altogether from his liability to the plaintiff as principal, the defendant is also clearly liable as guarantor. The letter of guarantee is unequivocal in its terms. The reference to payment "while the work is in progress" can in no way be construed as a condition. I am unable to read it as imposing a condition that, unless demand was made for a payment or payments while work was in progress, the guarantee was null and void. The undertaking of the defendant to pay cannot reasonably be construed as imposing an obligation on the plaintiff to demand payment while work was in progress. The promisee, which is the plaintiff in this case, was at liberty to dispense with performance under section 64 of the Contracts (Malay States) Ordinance. Nor can I read into the letter of guarantee anything in the nature of an obligation imposed on the plaintiff to inquire into the accounts between the plaintiff and the third party. In the result I give judgment for the plaintiff for $3,101.60 against the defendant; with interest at 6% per annum and costs of this action to be taxed.

As to the defendant's claim to be indemnified by the third party, the defendant himself admitted that he had paid no more than $19,000 towards a contractual liability of $22,500. It will be observed that a balance of $398.60 stands to the credit of the third party after deduction of the plaintiff's bill from the contract price of $22,500. The claim of the defendant against the third party is accordingly dismissed with costs. As stated before, I do not propose in this action to decide on the cross-claims between the defendant and the third party.

Judgment for the plaintiff.

Solicitors: *Lovelace & Hastings; Cheah Theam Swee & Co.; T. C. Tang & Co.*

FOO TOCK LIN v. PIONG KEW

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) October 29, 1962]

[K.L. — F.M. Civil Appeal No. 27 of 1961]

Contract — Oral agreement for sale of house — Written agreement containing different terms — Whether oral evidence admissible to prove true terms — Whether there was consideration for written agreement.

The appellant alleged that in February 1961, she agreed orally to sell a piece of land for $20,000 payable in one sum to the defendant. Pursuant to this agreement, the plaintiff executed a document of transfer in respect of the land in favour of the defendant and the consideration as stated therein was $1,200. By a written

agreement dated March 22, 1961, made between the same parties, it was agreed that the sum of $20,000 was payable by instalments over a period of six years. The appellant brought an action for the recovery of the $20,000 on the grounds that (1) the oral agreement was the true agreement and (2) there was no consideration for the written agreement varying the terms of the oral agreement.

Held: (1) parole evidence was not admissible to show that there was no common intention to be bound by the written agreement;

(2) there was consideration shown on the written agreement as it introduced the presence of a guarantor.

Case referred to:—

(1) *Bank of Australasia* v. *Palmer* [1897] A.C. 540, 545.

COURT OF APPEAL.

Goh Bin Lay for the appellant.

Robert Hsieh for the respondent.

Thomson C.J. (delivering oral judgment): This is an appeal from a decision of Mr. Justice Adams. I do not think it is necessary to deal in detail with the facts of the case which up to a point are not in dispute and which are set out in great and, as far as I can see, accurate detail in the trial Judge's judgment.

The claim of the present appellant, who was the plaintiff in the original proceedings, was that some time (the exact date is not of any very great importance) in February, 1961, by an oral agreement she agreed to sell and the defendant agreed to buy a piece of land near Kluang for $20,000 payable in one sum there and then. In pursuance of that agreement or otherwise, but certainly it was a fact, the plaintiff executed a document of transfer in respect of the land in favour of the defendant which was duly registered. The consideration as shown on the transfer was $1,200 but I do not think anything turns on that so as to assist either party.

The defendant's case was that the true agreement between the parties was not an oral agreement made some time in February as alleged by the plaintiff, but a written agreement dated 22nd March, 1961, whereby the one party agreed to sell and the other party agreed to buy the land in question for a sum of $20,000 by instalments, a first instalment of $400 and the balance by monthly instalments spread over six years at the rate of $272 a month.

The trial Judge found that that written agreement was the true agreement between the parties and that therefore the plaintiff was not entitled to recover the $20,000 for which she sued.

It is against that decision that the plaintiff has now appealed.

The appellant admits that she and the respondent both signed the agreement of the 22nd of March. It is true that the trial Judge said the appellant's case was *non est factum*. That, of course, is wrong and only illustrates the danger of Judges speaking in Latin and not in English. The true grounds on which the appellant denied that that written agreement, which she fully admitted executing, were two in number.

In the first place she said it was in effect a new agreement which represented a variation of the original oral agreement in favour of the respondent, that there was no consideration and therefore it was void. The second ground on which she said that the agreement was to be disregarded was this. She said that although she signed it she had no intention of being bound by it and the only reason she signed it was that she wanted some sort of evidence to shew that the agreed price for the land was $20,000 and not $1,200 as shewn on the document of title, which indeed was a price so very far from the true unimproved value of the land.

With regard to the first of these points. even if one accepts the appellant's evidence as to the oral agreement at its face value, there is fresh consideration shewn on the face of the written agreement; that fresh consideration consists in the introduction as guarantor of a partnership of which the respondent was what is called Managing partner and on behalf ot which he signed and affixed what is called the "chop" of the partnership. There is no suggestion that there was any such guarantee contained in the original agreement. It is, however, said that the guarantee that does appear on the written document is an illusory one and therefore does not amount to consideration. The answer to that is that there is no evidence to that effect. It is not denied that the respondent is the Managing partner of the business in question and in the circumstances it was for the appellant, the party who was attempting to say that the new consideration was of no value, to produce some evidence to that effect.

With regard to the second point that there was no true agreement because there was no *consensus ad idem*, no common intention to be bound by the written agreement, the answer clearly is that parole evidence to that effect was not admissible. As was said by Lord Morris in the case of the *Bank of Australasia* v. *Palmer*:—(1)

> ". . . . . parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract."

Clearly, quite apart from any technicality of the law, if such evidence was admissible then no written contract would ever be accepted by the parties to it as something binding on them because it would be always open to one of them when it

suited him to say: "Well I signed this. I understood it. I signed it consciously but I signed it with the mental reservation that if necessary I would not accept it as binding upon me." If such evidence were admissible to invalidate a written contract then the whole fabric of our commercial life would fall to the ground.

In the circumstances and for these reasons I would dismiss the appeal with costs.

Hill and **Barakbah JJ.A.** concurred.

Appeal dismissed.

Solicitors: *Goh Bin Lay; Boswell, Hsien & Lim.*

LIM FOO YONG LTD. v. THE COLLECTOR OF LAND REVENUE

[P.C. (The Lord Chancellor (Lord Dilhorne), Lord Jenkins and Lord Pearce) November 27, 1962]

[Privy Council Appeal No. 14 of 1961]

Land Acquisition — Appellants owners of 2 pieces of land — Land not contiguous to each other but separated by strip of land 165 ft. in other ownership — Collector compulsorily acquiring one piece of land — Award of compensation based on market value — Award not taking account of severance or injurious affection to land not acquired — Damages — Method of calculating — Land Acquisition Enactment (Cap. 140), s.29.

The appellants owned two pieces of land 2.3 and 4.2 acres respectively which were not contiguous to each other but the shortest distance between them was 165 ft. The appellants proposed to construct on the latter (hereinafter referred to as the hotel land) a first class hotel of international standards and on the former a swimming pool, two tennis courts, a badminton court, a sports pavilion and a car park so as to enhance the amenities of the hotel. This former piece of land (hereinafter referred to as the acquired land) was compulsorily acquired by the respondents who awarded $60,000 as full compensation. This was in respect of its market value. The Collector awarded nothing in respect of damage to the company's other land either on account of severance or of injurious affection. Before the trial judge the appellants claimed that the assessment of the market value of the acquired land was too low and sought also to establish that they had suffered damage by reason of severance. Ong J. (after having heard the evidence and inspected the two premises) awarded $202,280 in respect of the acquired land. The learned judge also awarded as compensation for damages by reason of severance under section 29(i)(c) an additional sum of $276,240. Both parties appealed. The Court of Appeal held that severance was established and therefore the appellants were entitled to compensation under section 29(i)(c). The Court of Appeal also held that the amount awarded by Ong J. was calculated erroneously because (i) the principle in *British Transport Commission* v. *Gourley* (1) had no application in cases such as this where the difference in rental and so of income of the appellants is used solely for the purpose of determining the loss of capital value of the hotel land due to severance, (ii) the learned trial judge erred in calculating the loss by severance in that he failed to take account of the amount to be awarded as the market value of the land acquired, with the result that the appellants were in effect to be paid twice over for the land taken from them. Further the court held that the appellants failed to discharge the onus of proof of establishing that they had suffered any damage by reason of severance. On appeal,

Held: (1) in the circumstances of this case, the fact that on the appellants' calculation the loss in value of the hotel land was so very substantial as a result of being deprived of the use for recreational purpose of a piece of land not contiguous to the hotel land to which there was access over land in other ownership gives rise to grave doubts as to the accuracy of their claim;

(2) the appellants failed to satisfy the Board that the Court of Appeal were wrong in rejecting the award made by the trial judge;

(3) it was for the appellants to establish that they had suffered damage in the diminution of the value of the hotel land due to severance and they failed to prove that they suffered any such damage.

Case referred to:—

(1) *British Transport Commission* v. *Gourley* [1956] A.C. 185.

PRIVY COUNCIL APPEAL.

Viscount Bledisloe, Q.C., G. A. Grove and *Yong Pung-How* for the appellants.

R. D. Stewart Brown, Q.C., and *P. G. Clough* for the respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

The Lord Chancellor: This is an appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya allowing in part an appeal from an award of compensation by Ong J. (sitting with two assessors) in respect of 2.3 acres (101,140 sq. ft.) of land at Kuala Lumpur which was compulsorily acquired from the appellants by virtue of the Land Acquisition Enactment, Chapter 140.

The appellants also owned other land, 4.2 acres (183,000 sq. ft.) in extent, on which they planned to build a first class hotel, judged by international standards. This land, which can conveniently be referred to as "the hotel land", was not contiguous to the land compulsorily acquired; the shortest distance between the hotel land and the acquired land is 165 feet. In 1956 an agreement had been made with the owners of the intervening land by Mr. Lim Foo Yong whereby he was allowed to use an existing footpath between the hotel land and the acquired land.

The appellants proposed to construct on the acquired land, not only a swimming pool with seating for spectators but also two tennis courts, a badminton court, a sports pavilion and a car park, and so enhance the amenities of the hotel.

They claimed compensation under two heads, first for the value of the land acquired and secondly for the damage alleged to have been suffered by them by reason of the acquisition.

The latter claim was made by virtue of section 29 of the Land Acquisition Enactment the relevant provisions of which are as follows:—

(i) in determining the amount of compensation to be awarded for land acquired under this enactment, the court shall take into consideration the following matters and no others, namely:

(*a*) the market value at the date of the Publication of the notification .....;

(*b*) .....;

(*c*) the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of severing such land from his other land;

(*d*) the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the